

6751-C
RECORDATION NO. _____

Filed & Recorded
OCT 27 1972 - 1 55 PM

(GREENVILLE)

AMENDMENT dated as of October 1, 1972 to Lease of Railroad Equipment dated as of September 1, 1972 ("Lease") between St. Louis-San Francisco Railroad Company ("Lessee") and Mercantile Trust Company N.A. ("Lessor").

WHEREAS, the Lessor and the Lessee wish to amend the Lease as hereinafter set forth;

Now, THEREFORE, in consideration of the mutual promises, covenants and agreements hereinafter set forth, the parties hereto do hereby agree as follows:

1. Subparagraph (B) of paragraph (b) of § 10 is hereby amended to read as follows:

(B) such sum as, in the reasonable opinion of the Lessor, will cause the Lessor's net return (taxes being calculated at the Assumed Rates) under this Lease to be equal to the net return (taxes being calculated at the Assumed Rates) that would have been available to the Lessor if the Lessor had been entitled to take a deduction in respect of the depreciation of each Unit over a 12-year life to a net value equal to 0% of the Purchase Price under regulations to be prescribed by the Secretary of the Treasury or his delegate under Section 167(m) of the Internal Revenue Code of 1954, as amended (hereinafter called the Class Life Deduction), which Class Life Deduction was lost, not claimed, not available for claim, disallowed or recaptured in respect of a Unit as a result of the failure of said Secretary to permit a Class Life Deduction to the extent described above or as the result of the breach of one or more of the representations, warranties and covenants made by the Lessee in § 17 or any other provision of this Lease, the termination of this Lease, the Lessee's loss of the right to use such Unit, any action or inaction by the Lessor or the sale or other disposition of the Lessor's interest in such Unit after the concurrence of an Event of Default.

2. § 17 of the Lease is hereby amended to read as follows:

§ 17. *Federal income taxes.* (1) The Lessor, as the owner of the Units, shall be entitled to such deductions, credits and other

Filed and recorded with the Interstate Commerce Commission pursuant to Section 20c of the Interstate Commerce Act on, 1972, atM.,
Recordation No.

benefits as are provided by the Internal Revenue Code of 1954, as amended from time to time, and the regulations thereunder (hereinafter called the Code) to an owner of property, including (without limitation) the Investment Credit and the Class Life Deduction (as defined in § 10 of this Lease), with respect to the Units, and the Lessor shall be entitled to deductions for any interest payments made pursuant to the Security Documents (all of the above deductions, credits and other benefits being in this § 17 called "Benefits"). Nothing herein contained shall be construed as an election by the Lessor to treat the Lessee as having acquired the Units for the purposes of the Investment Credit or as a representation or warranty by Lessee of the matters referred to in the preceding sentence.

(2) Lessee agrees that neither it nor any corporation controlled by it, in control of it, or under common control with it, directly or indirectly, will at any time take any action or file any returns or other documents inconsistent with the foregoing and that each of such corporations will file such returns, take such action and execute such documents as may be reasonable and necessary to facilitate accomplishment of the intent thereof. Lessee agrees to keep and make available for inspection and copying by Lessor such records as will enable Lessor to determine whether it is entitled to the full benefit of the Investment Credit and the Class Life Deduction with respect to the Units.

(3) Lessee represents, warrants and agrees that (i) none of the Units constitutes property the construction, reconstruction or erection of which was begun before April 1, 1971; (ii) at the time of delivery of the Units to the Lessor, the Units will constitute "new section 38 property" within the meaning of Section 48(b) of the Code and will not have been used by any person so as to preclude "the original use of such property" within the meaning of Section 167(c)(2) of the Code from commencing with Lessor; and (iii) at the time of delivery of the Units to the Lessor, and at all times during the term of this Lease, each Unit will constitute property eligible for the Class Life Deduction, provided, however, that any change in Section 167(m) of the Code or the regulations promulgated thereunder which shall redefine property eligible for the Class Life Deduction in a manner that excludes the Units shall not

constitute a violation of Lessee's representation and warranty hereunder.

(4) If Lessor shall lose, or shall not have or shall lose the right to claim, any portion of the Benefits with respect to any Unit as a result of (A) any one or more of the following events or circumstances:

(a) Any representation, warranty, fact, estimate, opinion or other statement made or stated by the Lessee (or any officer, employee or agent thereof) contained herein, in the related Finance Agreement or Security Documents or otherwise, made in writing in connection herewith, shall prove to be fraudulent, untrue, incorrect, inaccurate, misleading, unreasonable or insufficient in whole or in part; or the Lessee shall take any action in respect of its income tax returns or otherwise which shall be inconsistent with, or in contravention of, any of the transactions contemplated hereby or thereby; or the Lessee (or any officer, employee or agent thereof) shall take any other action whatsoever which shall cause the loss of any portion of the Benefits (provided, however, that the Lessee shall not be required by the terms of this section to indemnify the Lessor for the loss of the Investment Credit where there has been a Casualty Loss and Lessee has paid in full the Casualty Value under § 7); or

(b) The failure of the Lessee to perform or observe any covenant, condition or agreement to be performed or observed by it under this Lease or said related documents; or

(B) A final determination that the provisions of this Lease and/or the Security Documents (as the same may be amended from time to time by agreement of the parties) are such that Lessor is not entitled to all or any portion of the Benefits;

Then in either such event Lessee shall pay the Lessor, as supplemental rent (i) amounts which in the aggregate, after deduction of all taxes required to be paid by the Lessor in respect of the receipt thereof under the laws of the United States or of any state or of any political subdivision thereof (after giving credit for any savings in respect of any such taxes by reason of deductions, credits or allowances in respect of the payment of any other taxes), shall be equal to (a) the increased tax paid by the Lessor by reason of

such loss, (b) the amount of any penalties assessed by the United States against the Lessor with respect to the underpayment of any estimated tax attributable to the disallowance of any claimed Benefits, and (c) all fees and other expenses paid or incurred by the Lessor in respect to any matters arising under this § 17; plus (ii) the amount of any interest which may be assessed by the United States against the Lessor attributable thereto, plus (iii) in the event the Lessor shall pay the tax claimed and then seek a refund and the final determination of such claim shall be adverse to the Lessor, interest on the amount of the tax paid attributable to the Benefit disallowed by such claim, computed at the rate of 8% per annum compounded annually from the date of payment of such tax to the date the Lessee shall reimburse the Lessor for such tax in accordance with the provision of this § 17; provided, however, that if a ruling by the Internal Revenue Service is obtained which provides that the Benefits or any of them are available to Lessor, the Lessor shall have no claim to supplemental rent from Lessee pursuant to clause (B) above as a consequence of a subsequent loss of any such Benefits. To the extent a ruling by the Internal Revenue Service does not provide that the Benefits or any of them are available to Lessor, the Lessor shall be entitled to claim supplemental rent from Lessee pursuant to clause (B) above as a consequence of a subsequent loss of any such Benefits.

Lessor agrees that it will apply for and diligently seek a ruling that all the Benefits are available to it.

(5) Lessor shall have no claim against Lessee for additional rent under clause (B) above if Lessor's entitlement to the Benefits or any portion thereof is lost as a direct result of the occurrence of any one of the following events:

(i) a voluntary transfer by the Lessor of legal title to the Units, the disposition by the Lessor of any of its interest in the Units, or the reduction by the Lessor of its interest in the rentals from the Units under the Lease, unless, in each case, an event of default shall have occurred and be continuing; (ii) the failure of the Lessor to claim such Investment Credit or the Class Life Deduction in its income tax returns for the appropriate years or the failure of the Lessor to follow procedure in claiming the same; or (iii) the failure of the Lessor to have

sufficient income to benefit from the Investment Credit or the Class Life Deduction.

(6) If Lessee becomes obligated to pay additional rentals by reason of the operation of clause (B) above, then, at the option of Lessee, and in lieu of such additional rentals, Lessee or a designate of Lessee may purchase the interest of Lessor in the Units and Security Documents for an amount equal to Lessor's investment, plus interest at the rate of 8%, commencing with the date or dates of Lessor's investment and ending on the day preceding such purchase plus all fees or expenses paid or incurred by Lessor in respect to matters set forth in this § 17, provided, however, that such purchase option may be exercised by Lessee no later than 180 days following a final determination as hereafter described in paragraph (1), (2) or (3) of subparagraph (11) of this § 17 that results in the loss of any Benefit or portion thereof. Upon payment by Lessee of the purchase price described in this paragraph (6), Lessor shall return to Lessee any rental payments or portion thereof theretofore paid by Lessee which have not been applied by Lessor to the payment of the Conditional Sale indebtedness (as defined in the Security Documents) or interest thereon. With the agreement of Lessor and Lessee, the rental payments to be returned by Lessor to Lessee upon payment by Lessee of the purchase price instead may be credited against the purchase price as determined herein.

(7) The Lessor agrees that if, in the opinion of independent tax counsel selected by the Lessor and acceptable to the Lessee (herein referred to as counsel), a bona fide claim to all or a portion of the Benefits on the Units exists in respect of which the Lessee is required to pay increased rental as aforesaid to the Lessor as above provided, the Lessor shall, upon request and at the expense of the Lessee, take all such legal or other appropriate action deemed reasonable by counsel in order to sustain such claim and the Lessor may take such action prior to making payments and then sue for the amounts claimed pursuant to a notice of disallowance or may make such payments and then sue for a refund. The Lessor shall not be obligated to take any such legal or other appropriate action unless the Lessee shall first have indemnified the Lessor for all liabilities and expenses which may be incurred therein and shall have furnished the Lessor with such reasonable security therefor as may be requested.

(8) If the Lessor's right to claim all or such part of the Benefits with respect to the Units which was not claimed or was disallowed shall be established by the final judgment or decree of a court or administrative agency having jurisdiction thereof, on the next succeeding rental payment date after such judgment or decree shall have become final, the rental rate in respect of such Units set forth in § 3 of this Lease shall again become applicable to the said Units, and the Lessor shall forthwith upon demand of the Lessee reimburse Lessee in an amount equal to the supplemental rent, if any, attributable to all or such part of the Benefits the right to which was so established.

(9) The Lessee's agreement to pay any sums which may become payable pursuant to this § 17 shall survive the expiration or other termination of this Lease.

(10) The time at which Lessor may claim and when Lessee is obligated to pay supplemental rent as above provided shall be (i) as to (A) above, at any time after such Benefit could have been claimed by Lessor if it were allowable, or if claimed and then lost at any time after payment of the tax attributable thereto; or (ii) as to (B) above, upon the occurrence of a final determination.

(11) A "final determination" pursuant to clause (B) above shall have been made as to the loss or unavailability of the Benefits or portion thereof on the first to occur of the following:

- (1) A final judgment of (a) the United States Tax Court, (b) a United States District Court, or (c) the United States Court of Claims, unless appeal or appeals from any such judgment is taken by the agreement of the Lessee and the Lessor, in which event the final disposition of the appeal shall be deemed such "final determination", or (2) a determination is made by counsel that there is no reasonable probability of success of litigation challenging a determination of the Commissioner of Internal Revenue or his delegate that such portion of the Benefits is not allowable, or the expiration of 60 days after an opinion as to any such determination is requested by Lessor and no opinion thereon is rendered by such counsel, or (3) an agreement thereto by the Lessor and Lessee.

(12) Any claim by Lessor for the payment of supplemental rent as above provided shall be made in writing, specifying the amount thereof. Such claim for supplemental rent shall be paid by Lessee within 30 days after the receipt of Lessor's written claim unless Lessee notifies Lessor within said 30 days that Lessee disputes the amount of such claim, in which case a firm of independent certified public accountants of recognized national standing shall be designated by the Lessee and Lessor. Such firm shall, within 60 days of selection, determine the amount of such claim, which determination shall be final. The expenses incurred in establishing the amount of such claim shall be borne by the Lessee.

(13) In the event of a final determination as provided above with respect to any benefit or portion thereof, supplemental rent with respect thereto, for years subsequent to the period to which the final determination applies, shall be computed in accordance with such final determination. With respect to any year other than those specifically covered by the final determination and the years subsequent thereto, unless otherwise agreed by Lessor and Lessee, supplemental rent shall be due to the extent that such final determination results directly or indirectly in a loss of a Benefit or portion thereof for such other year.

(14) The rental in § 3 has been computed on the assumption that the lower limit of the asset depreciation range over which the Units may be depreciated for Federal income tax purposes is 12 years; in the event that Lessor shall be permitted to use an asset depreciation period of 11 years, and elects to do so, the figure of 2.14939 percent in § 3 shall instead be deemed to be 2.13456 percent as of the commencement of the term of this Lease, and Lessor will refund to Lessee any difference in the two amounts, together with interest at the rate of 4 percent per annum from the date of each payment to the date of such refund.

(15) If any payment is made by the Lessee under the preceding provisions of this § 17 in respect of any Benefit, but Lessor is entitled to utilization of the Benefit or a comparable tax Benefit in the future by reason of the deferral of the Benefit lost, the Lessor shall pay to the Lessee within 30 days after each receipt by the Lessor of such Benefit or comparable tax Benefit such amount as in the reasonable opinion of the Lessor will reflect the utilization by Lessor of such Benefit or comparable tax Benefit.

3. A new § 23 shall be added to the Lease, as follows:

§ 23. **Eminent Domain.** In the event that during the term of this Lease the use of any Unit of Equipment is requisitioned or taken by any governmental authority under the power of eminent domain or otherwise, the Lessee's duty to pay rent shall continue for the duration of such requisitioning or taking. The Lessee shall be entitled to receive and retain for its own account all sums payable for any such period by such governmental authority as compensation for requisition or taking of possession up to an amount equal to the rent paid or payable hereunder for such period, and the balance, if any, shall be payable to and retained by the Lessor as its sole property.

IN WITNESS WHEREOF, the parties hereto have executed or caused this instrument to be executed all as of the date first above written.

ST. LOUIS-SAN FRANCISCO RAILWAY
COMPANY

By Donald E. Engle
Vice President

[CORPORATE SEAL]

Attest:

Assistant Secretary

MERCANTILE TRUST COMPANY N.A.

By Vice President

[CORPORATE SEAL]

Attest:

Assistant Secretary

STATE OF MISSOURI }
CITY OF ST. LOUIS } ss.:

On this 24th day of October, 1972, before me personally appeared Ronald E. Engle, to me personally known, who, being by me duly sworn, says that he is a Vice President of ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, that one of the seals affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Sarah J. McLafferty
SARAH J. McLAFFERTY, Notary Public

[NOTARIAL SEAL]

My Commission Expires April 21, 1974, which adjoins City of St. Louis, Missouri, where this act was performed.

STATE OF MISSOURI }
CITY OF ST. LOUIS } ss.:

On this 24th day of October, 1972, before me personally came Donald B. Whinnans, to me known, who, being by me duly sworn, did depose and say that he resides at 3044 Canfield Drive, that he is a Vice President of MERCANTILE TRUST COMPANY N.A., the national banking association described in and which executed the above instrument; that he knows the corporate seal of said association; that one of the seals affixed to the said instrument is such association seal; that it was so affixed by authority of the Board of Directors of said association, and that he signed his name thereto by like authority.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[NOTARIAL SEAL]

MY COMMISSION EXPIRES 10-2-75

Florence M. Gerdel
Notary Public
City of St. Louis
Florence M. Gerdel